THE STATUS OF SCIENTIFIC RESEARCH WHALING IN INTERNATIONAL LAW

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I. INTRODUCTION

It is an honor to speak before you at this panel. The issue of whaling has been extensively debated in various international occasions for at least one quarter of the century. No quick solution has yet to be found. This is partly because arguments against or for whaling tend to based on political feelings, although these political feelings vary from country to country. In this situation, the legal and scientific facts are deserved to be the basis of the debate in order to achieve a proper settlement of the issue

Today, I will provide the view of the Government of Japan on Japan's research program that includes the limited, lethal taking of whales. I will first summarize the reasons why the research program complies with Japan's obligations under international agreements, and then explain in greater detail the scientific nature and purpose of the research program. Finally, I will discuss how Japan's programs and policies are consistent with those of other countries, and with the conservation of all species of whales.

II. THE LEGAL CONTEXT OF JAPAN'S RESEARCH PROGRAM

The Japanese research program does not violate the letter or spirit of the International Convention for the Regulation of Whaling ("ICRW"),[1] nor does it violate the letter or spirit of the United Nations Convention on the Law of the Sea ("UNCLOS").[2]

A. ICRW

The ICRW stipulates in Article VIII that "[n]ot withstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research."[3]

The conduct of the Japanese government is in complete conformity with this provision. The text of the ICRW does not endorse a total protection of whales that would preclude the taking of any whales. Rather, a key objective of the ICRW is "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."[4] It is clear that the ICRW represents an agreement to

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1. International Convention for the Regulation of Whaling, Dec. 2, 1946, T.I.A.S. No. 1849, 161 U.N.T.S. 72 [hereinafter ICRW].

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter Law of Sea].

3. ICRW, *supra* note 1, art. VIII, ¶ 1.

4. *Id.* at pmbl.

manage whale stocks to permit the wise commercial use of the stocks and to avoid irresponsible exploitation.

Because the Japanese research program collects data necessary for whale conservation and the proper use of whale resources, the research program helps achieve the objectives of the ICRW.

B. UNCLOS

Article 65 of UNCLOS provides that "[s]tates shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study."[5]

With respect to the conservation of whales, Japan is working in good faith through international bodies, including the International Whaling Commission ("IWC"). We provide research data and other information to other countries and international organizations, and therefore it can reasonably be stated that our research practices do not conflict with this provision of UNCLOS.

C. IWC Resolutions

The IWC every year passes resolutions that recommend that Japan refrain from conducting its whale research program. However, such recommendations are non-binding. The resolution is proposed as a non-binding instrument, and adopted by a simple majority vote. At the 2001 IWC meeting, members of the IWC adopted two such resolutions, one by a vote of twenty-one for, fourteen against, and one abstention, and the other by a vote of twenty for, fourteen against, and two abstentions.

To adopt binding "regulations with respect to the conservation and utilization of whale resources" pursuant to Article V, the ICRW requires a three-fourths majority of those members voting.[6] Also, the Rules of Procedure of the IWC require that any proposal involving an amendment to any Schedule adopted pursuant to Article V be "dispatched by airmail to the Commissioners at least sixty days in advance of the meeting."[7] The resolutions the IWC adopts on Japan's research program are usually introduced at the time of the meeting, without sixty days' prior notice of the text to members, thereby further indicating that the members do not consider the resolutions to be formally binding on Japan.

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5. Law of Sea, *supra* note 2, art. 65.

6. ICRW, *supra* note 1, art. III, ¶ 2.

7. ICRW, *supra* note 1, Rules of Procedure, R. J., Order of Business.

These resolutions, because they are not binding under the terms of the ICRW, are asking a member state voluntarily to give up its treaty rights to conduct research. Failure to comply with such a request does not constitute a violation of the ICRW.

D. Conformity with Other IWC Regulations

Some may question Japan's catching of Minke whales in the Southern Ocean Sanctuary. Again, this activity does not violate the ICRW. The sanctuary provision prohibits only commercial whaling.[8] Therefore, it does not apply to Japan's research program. Furthermore, Japan does not think this sanctuary is necessary to achieve the goal of the ICRW. Japan therefore lodged an objection to the Southern Ocean Sanctuary pursuant to Article V.3.[9] As a result, under the terms of the ICRW Japan is not bound by the IWC's action on this sanctuary.

E. Proper Role of Science in IWC Deliberations

We believe that IWC members have made decisions in recent meetings that are inconsistent with the requirements in the ICRW that all such actions be based on science. These decisions include the approval of the sanctuary I have just discussed, which the members adopted without benefit of a supporting recommendation from the Scientific Committee. They also include the IWC's decision not to adopt a Revised Management Procedure ("RMP") as part of a Revised Management Scheme ("RMS") to regulate any commercial whaling that IWC members may approve, despite the approval by the Scientific Committee of a proposed RMP.

In 1993, the then-Chairman of the Scientific Committee, Philip Hammond, resigned from his position over the failure of the majority of IWC members to base their action on a proposed RMP on science. In his letter of resignation, Hammond noted that in 1992 the Science Committee unanimously recommended the adoption of an RMP to guide any possible resumption of commercial whaling that the IWC may approve. The members of the IWC declined to follow the recommendations of the Scientific Committee for reasons that Hammond wrote had "nothing to do

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8. ICRW, *supra* note 1, Schedule, ¶ 7(b).

9. ICRW, *supra* note 1, sched., fn. relevant to ¶ 7(b) ("The Government of Japan lodged an objection within the prescribed period to paragraph 7(b) to the extent that it applies to the Antarctic Minke whale stocks . . . For all Contracting Governments except Japan paragraph 7(b) came into force on 6 December 1994"). Schedule, fn. relevant to ¶ 7(b).

with science."[10] He told the IWC's Secretary that "I can no longer justify to myself being the organizer of and spokesman for a Committee whose work is held in such disregarded by the body to which it is responsible."[11]

The 1994 decision to adopt the Southern Ocean Sanctuary was based on political opinion rather than scientific fact. The Scientific Committee of the IWC did not issue a recommendation supporting adoption of the Southern Ocean Sanctuary in 1994, and in fact had not even seen the amended sanctuary proposals the IWC adopted that year.[12] The chairman of the Scientific Committee, to the contrary, suggested "there was little to gain" from the proposal.[13] Prior to the IWC Annual Meeting in 1994, Japan proposed a scientifically appropriate compromise version that would have excluded abundant Minke whales from the prohibition against the taking of whales in the sanctuary. At the same time it warned that "the IWC would enter into an identity crisis if such a [Southern Ocean] sanctuary with no scientific backing were to be adopted at the upcoming 46th Annual Meeting of the IWC. Abandoning science would constitute a dangerous precedent for all resource management in the future."[14] However, a majority of the members of the IWC voted against this compromise, and approved a sanctuary proposal covering all IWC species, regardless of the status of the stock of each species. In a subsequent letter to the IWC, the Commissioner of Norway to the IWC reiterated Norway's opposition to the Southern Ocean Sanctuary and indicated that the establishment of this sanctuary was not in accordance with the ICRW because "there is no scientific basis for the Southern Ocean Whale Sanctuary."[15]

The actions of the IWC members on adopting the Southern Ocean Sanctuary and disapproving RMP ignore Article V.2 of the ICRW, which states that any amendments to the Schedule governing the taking of whales "shall be based on scientific findings,"[16] among other requirements.

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10. Letter from Philip Hammond, Chairman, IWC Scientific Committee, to Dr. R. Gambell, IWC Secretary 2 (May 26, 1993), *at* www.highnorth.no/Library/mgnagreement-resignation/IWC/le-frotn.html.

11. *Id.*

12. 45 REP. INT'L WHALING COMM'N 45, 27-28 (1995).

13. *Id.* at 27.

14. Letter from Kazuo Shima, IWC Commissioner for Japan, to IWC Commissioners (Apr. 28, 1994).

15. Letter from Karsten Klepsvik, IWC Commissioner for Norway, to Dr. R. Gambell, IWC Secretary 1 (Sept. 5, 1994).

16. ICRW, *supra* note 1, art. V, ¶ 2(b).

III. SCIENTIFIC NATURE OF JAPAN'S RESEARCH PROGRAM

People sometimes complain that Japan's program violates the ICRW because it constitutes commercial whaling rather than scientific research. From our viewpoint, this is a serious misunderstanding of the nature of Japan's activities. As I will now discuss, Japan's scientific research program falls clearly within the provisions of the ICRW giving a member state the unconditional right to engage in scientific research activities.

A. View of Scientific Committee of the IWC

Japan's research plan and its results are annually reviewed and commented on by the IWC's Scientific Committee. The Committee consists of over one hundred scientists from around the world. Each year the members of this Committee give Japan's research program a positive evaluation.

For example, the 1997 Report of the Scientific Committee reported favorably on Japan's Antarctic research program, known as JARPA. The report noted that "[t]here was general agreement that the data presented on stock structure . . . were important contributions to the objectives of JARPA and stock management."[17] The report added "the information produced by JARPA has set the stage for answering many questions about long term population changes regarding Minke whales . . . [and] has already made a major contribution to understanding of certain biological parameters."[18]

Japan also conducts another research program in the North Pacific that involves an annual sampling of 100 Minke whales, fifty Bryde's whales, and ten Sperm whales. This program, known as JARPN, has similar scientific objectives. The 2000 Report of the Scientific Committee noted that "information obtained during JARPN had been and will continue to be used in the refinement of *Implementation Simulation Trials* for North Pacific Minke whales, and consequently was relevant to their management."[19]

Some people claim that the Scientific Committee has suggested that Japan's research is not needed for whale management. This is another serious misunderstanding. It appears that the claim is based on citing out of context a portion of one sentence from the same 1997 report noted above that refers to the "major contribution" that JARPA was making. The sentence states: "The results of the JARPA program, while not

17. IWC, REP. OF THE SCI. COMMITTEE, IWC Doc. IWC/49/4, at 61 (1997).

18. *Id.* at 65.

19. IWC, REP. OF THE SCI. COMMITTEE, IWC Doc. IWC/52/4, at 74 (2000).

required for management under the RMP, have the potential to improve the management of Minke whales in the Southern Hemisphere."[20]

I was at the IWC meeting that particular year. Members of the Scientific Committee shared an implicit assumption that the RMP's algorithms and computer program for calculating catch limits required only a few data inputs at the beginning stage of operations. At the same time, members of the Scientific Committee knew that if the input of additional data occurred, the accuracy of the RMP would increase. This is the context of the original wording in the Scientific Committee's report. It does not oppose the collection of additional data by Japan, and it in fact recognizes the positive role such additional data plays in improving the management of Minke whales.

The IWC's Scientific Committee has not endorsed Japan's research catch. However, this is because the Scientific Committee is not authorized to do so. Paragraph thirty of the applicable ICRW schedule only directs the Scientific Committee to review and comment when possible on the research of member states.[21] It is not the function of the Scientific Committee or the IWC to endorse or approve the research program generally, or its level of catch in particular. Only the government of the member state conducting the research has that right, under Article VIII of the ICRW.[22]

B. Importance of Japan's Research in Assessing the Moratorium

Japan undertook its research activity because the IWC needs scientific data to review the effects of its moratorium on commercial whaling. The moratorium by its own term does not preclude the resumption of commercial whaling. Paragraph 10(e) of the Schedule of the Convention adopted at the IWC Annual Meeting in 1982 specifies that "[t]his provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits."[23]

The research program will also contribute to the required review of the whale stocks in the Southern Ocean Sanctuary. According to Paragraph 7(b) of the Schedule of the Convention, "this prohibition [the Southern Ocean Sanctuary] shall be reviewed ten years after its initial

20. IWC, REP. OF THE SCI. COMMITTEE, IWC Doc. IWC/49/4, at 66 (1997).

21. ICRW, *supra* note 1, sched., ¶ 30.

22. ICRW, *supra* note 1, art. VIII, ¶ 1.

23. ICRW, *supra* note 1, sched., ¶ 10(e).

adoption."[24] The Government of Japan expects that Japan's research will provide valuable research data to assist in this review.

Before the IWC first adopted a moratorium on commercial whaling, most scientific data had been obtained from samples gathered in connection with such whaling. Scientists complained that the samples had serious data biases, because commercial whaling targeted only large individual whales in small areas where there is a high density of whales. This caused an argument over the "uncertainty of the scientific data," and contributed to the decision to adopt the moratorium.

Japan's research program is designed to obtain unbiased data, and to obtain a fair representative of samples from the whales in vast ocean areas. As part of this effort, the program requires the research vessels to follow a special course that was designed to ensure a valid random sample, even though this increases the cost of the research effort.

The sampling size is 440 Antarctic Minke whales per year, which is significantly smaller than the number of Minke whales caught commercially each year in the early 1980s. The larger the sample size, the higher the statistical reliability of the data. Japan decided to limit the catch to 440, however, since it is the lowest number of takings possible that would still yield statistically meaningful research results. It is a very small portion of the total population of Southern Hemisphere Minke whales. Scientists believe that the population of Antarctic Minke whales has rapidly increased in the last half century from its original population of 85,000. It has done so by filling the ecological vacuum created when excessive whaling several decades ago eliminated many larger whales such as blue whales. In 1990 the Scientific Committee estimated the population of Minke whales to be approximately 760,000. In 1992 the Scientific Committee estimated that commercial whaling conducted under IWC-approved procedures could take annually at least 2000 Minke whales with no risk of depletion of the whales in the Antarctic. Even if the current population should turn out to be in fact somewhat lower, an annual catch of 440 is unlikely to pose any danger to the stock.

The key data the research program obtains is the age of individual whales, which can only be obtained from the whale's internal earplugs. No other source can provide reasonably reliable data on the age of the whale. By using this age data, the research program can estimate whether the population trend is up or down.

The final results of Japan's research program are expected to reduce the risk of mismanagement of the Minke and other whale resources. In other words, Japan's research program is a good faith contribution to the

24. ICRW, *supra* note 1, sched., ¶ 7(b).

scientific review of the effect of the moratorium on whale stocks. The language establishing the moratorium in the first place mandates this scientific review.

C. *Effective Research Cannot Be Conducted Through Non-Lethal Methods*

The IWC has never concluded that non-lethal methods can adequately replace research that includes the lethal taking of whales, although there have been intensive discussions of this issue at the IWC. In the case of large terrestrial animals, scientists can closely study their age through individual identification of animals. This is relatively easy for terrestrial mammals in particular.

However, individual identification is almost impossible for Minke, Bryde's, and Sperm whales. As a result, scientists do not know of a non-lethal way to obtain age data for these whale species. The 1997 Report of the Scientific Committee agreed with this assessment, noting that the "logistics and abundance of Minke [whales] . . . probably precluded [the] application [of non-lethal methods]."[25]

I would also like to underline the fact that Japanese scientists conduct non-lethal research whenever possible. Many of our research projects only use sighting observations and acoustic surveys. Japan also studies stranded animals. The taking of whales is only permitted when it is absolutely necessary.

D. *Sale of By-Products of the Research Activity*

Paragraph 2 of Article VIII of the ICRW requires that by-products from research be fully utilized so far as is practicable. The provision states: "Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted."[26] Accordingly, the whale meat resulting from the research program is sold in the market by the Institute for Cetacean Research, the non-profit institute responsible for carrying out the research. These sales help defer a portion of the cost of the research program. The rest of the cost has to be covered by a government subsidy. Thus, the research program does not result in any net profit or similar commercial advantage to those responsible for the project.

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25. IWC, REP. OF THE SCI. COMMITTEE, IWC Doc. IWC/49/4, at 63 (1997).

26. ICRW, *supra* note 1, art. VIII, ¶ 2.

IV. OVERALL REASONABLENESS OF JAPAN'S POLICIES

Japan's policies are consistent with those of some other countries and with good conservation policies.

A. Majority of Countries Have Not Opposed Japan's Research

Some people argue that the vast majority of the world opposes the catching of whales for research. The majority of the countries of the world, however, have not taken a clear position on this issue.

There are around 190 countries in the world now. Only forty-three nations are members of the IWC. Only twenty-one of the forty-three nations have opposed Japan's research program. At least fourteen nations are sympathetic to this research, judging from the vote at the most recent IWC meeting.

With only twenty-one of the world's 190 countries clearly on record against Japan's research program, it is not accurate to say that the "world" is against this research.

B. Other Countries Also Catch Whales

When it comes to the taking of whales, various nations including Canada, Denmark, Indonesia, the Philippines, Norway, Russia, the United States, and a Caribbean nation catch large whale species such as Bowhead, Bryde's, Fin, Grey, Humpback, Minke, or Sperm whales.

The Bowhead whaling by the United States represents the highest ratio of harvest to total population of any program. Its annual harvest amounts to 0.9% of the Bowhead whale population. Japan's annual level of take in its research program is less than half this percentage.

A number of other countries in addition to Japan have also engaged in the taking of whales for scientific purposes, pursuant to Article VIII of the ICRW. Prior to 1982, over one hunred permits were issued by governments like the United States and Canada for this purpose. After adoption of the moratorium, Norway and Iceland also issued permits for research programs. Thus, Japan's research program is not unique.

C. Healthy Status of Certain Whale Stocks

Since the 1970s, whales have been protected, and most whale populations are abundant. There still are five depleted species among the large whales, and Japan strongly supports the international protection of these endangered whale species. Japan every year donates more funds than any other IWC member to support the IWC's research activities concerning these endangered species.

With respect to certain abundant species, however, it is no longer necessary to prohibit the taking of whales in order to protect them from becoming endangered. It is reasonable to allow the carefully regulated reopening of commercial whaling for these species to help achieve a key objective of the ICRW. Some people have expressed concern that once whaling is resumed; it will expand rapidly and become uncontrollable. This is highly unlikely.

The IWC Scientific Committee has adopted a new program for calculating appropriate catch limits based on the work of a well-known scientific expert, Dr. Justin Cooke. Japan and Norway have already agreed to these limits, although they are based on methodology so conservative that if it were applied to fish, it would preclude the harvesting of fish in most major fisheries on the high seas. In reality, the world's whaling industry shrank in the 1970s when cheap substitutes for whale oil were introduced. Even without strict IWC catch limits, overhunting would be unlikely to occur with the resumption of commercial whaling because demand for whale products today is much lower than in the past.

V. CONCLUSION

A program of limited taking of whales for the purpose of science would be consistent with the proper conservation of whaling stocks, as provided in the ICRW.

As a country that has an interest in responsible utilization of marine resources, Japan is conducting its current research program to assess the stock of certain whales within the limits of the current legal and scientific constraints. Japan only authorizes catches of the lowest number of non-endangered whale species necessary to carry out the scientific research anticipated by the existing schedules to the ICRW. No scientifically adequate alternatives to the research exist.

Some countries oppose the continuation of scientific research, while at the same time they argue Japan has not provided the necessary evidence that commercial whaling can be safely resumed. In no other fishery organizations do these countries argue against both commercial fishing and the conduct of scientific research necessary to determine the sustainability of the fishery. If they did make these arguments, almost all utilization of such fishery resources would be barred.

The differences of opinion between IWC members have proven exceptionally difficult to resolve. However, Japan will to continue to engage in dialogue with any other member in a good faith effort to resolve these differences.

Thank you. I look forward to hearing the comments of others, and to take questions from the audience.